at the date of selection, "to which they shall receive title the same as though originally granted," a railroad company is not entitled to lieu-select coal land, even though coal and iron lands are not excluded from its land grant but are declared therein not to fall within the term "mineral." P. 516.

54 App. D. C. 161; 295 Fed. 982, affirmed.

APPEAL from a decree of the Court of Appeals of the District of Columbia, which affirmed a decree of the Supreme Court of the District, dismissing a bill to restrain the Secretary of the Interior from canceling a railroad lieu selection.

Mr. F. W. Clements, with whom *Mr. Alexander Britton* was on the brief, for appellant.

In determining what is meant by "public lands not mineral," as used in the act of June 22, 1874, that act must be construed as *in pari materia* with the granting act; and when so construed, the lands are considered as non-mineral notwithstanding the presence of valuable deposits of coal. There is nothing in the act of 1874 limiting the selection of lands in lieu of those relinquished to other "lands equal in quantity *and value*," as said by the court below. Congress undoubtedly had a defined policy in permitting the large transcontinental railroads to take under their grants lands containing iron or coal products. These railroads were great undertakings opening up country practically unexplored, and coal and iron were necessary products, not only in construction, but in later maintenance of the proposed railways. Nothing had occurred to change this policy, and the construction of the act of '74 should be in line with the constructive policy so clearly defined in the original granting acts; and surely the generosity of the companies in relinquishing that which belonged to them, in order to protect unfortunates misled, furnishes no reason for changing this policy or penalizing the companies.

The act of 1874 provided that the grantee company should receive title to the lieu selection as though originally granted. In other words, the lieu lands were to be taken in place of those surrendered, as the surrendered lands might have been taken under original grant. This left both the companies and the individual as though the provision protecting those coming after definite location had been incorporated in the original grant. Nothing could be fairer, and if this were the purpose of Congress it could not have been more clearly expressed.

The granting act of 1866 permits selection within the enlarged or indemnity belt of lands containing valuable deposits of coal where taken in lieu of agricultural lands lost within the primary or place limits of the grants. The Secretary's action in refusing to approve the Company's selection is arbitrary, in that he exceeded his power and authority in taking into consideration in determining its validity the facts with respect to the possible coal contents and the valuation of the lands in that regard.

Mr. Harry L. Underwood, Special Assistant to the Attorney General, with whom *Solicitor General Beck* and *Assistant Attorney General Wells* were on the brief, for the appellee.

Mr. Chief Justice Taft delivered the opinion of the Court.

The bill in this case was filed by the Santa Fe Pacific Railroad Company, incorporated under an Act of Congress, against the Secretary of the Interior to enjoin him from canceling a certain selection of lieu lands, and to command him to recall the order for such cancellation and to refrain from any further action except to issue a patent therefor in accordance with the rights of the plaintiff.

By Act of Congress, July 27, 1866, 14 Stat. 292, Congress made a grant of lands in New Mexico and Arizona to the Atlantic & Pacific Railroad Company in aid of the construction of a railroad of that name. The company defaulted on its bonds, the mortgage was foreclosed, and a sale effected to the Santa Fe Pacific Railroad Company, the complainant, which became possessed of all the rights granted by the Act of July 27, 1866, to the mortgagor company. The grant of 1866 covered every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of the railroad line, not reserved, sold, granted or otherwise appropriated, at the time that the line of the road was designated by the filing of a plat in the General Land Office. The granting act provided further that the word "mineral" when it occurred in the Act should not be held to include iron or coal.

The Act of June 22, 1874, c. 400, 18 Stat. 194, provided:

"That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the preemption or homestead laws of the United States subsequent to the time at which, by the decision of the land office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: Provided, That nothing herein contained shall in any manner be so

construed as to enlarge or extend any grant to any such railroad or to extend to lands reserved in any land grant made for railroad purposes."

Pursuant to this legislation, the Railroad Company, on December 1, 1921, filed in the proper local land office an application to select the subject of the controversy here, being a forty-acre tract, the quarter of a quarter section within the primary or place limits of the grant in Arizona, in lieu of a tract of the same area in the same limits which it had relinquished because of a homestead claim coming within the terms of the Act of 1874. The filing was accepted by the local land office, but was rejected by the Secretary of the Interior because the land applied for was embraced in a coal withdrawal. The view of the Secretary was that the Act of June 22, 1874, did not authorize the selection of coal land in lieu of the land relinquished. The argument of the Railroad Company is that as the granting Act of 1866 declared that "mineral" in that act should not include coal or iron, the same construction should be given to the same word in the Act of June 22, 1874, in so far as selections made by the appellant are concerned.

The Supreme Court of the District sustained a motion to dismiss the bill for want of equity, and this action was affirmed by the Court of Appeals.

The question whether this Court has jurisdiction of the appeal is raised on behalf of the Secretary of the Interior. We think it has under the 6th paragraph of § 250 of the Judicial Code, which permits an appeal from the Court of Appeals of the District in cases "in which the construction of any law of the United States is drawn in question by the defendant." Certainly the Secretary of the Interior, as the defendant herein, by his contention that the Act of 1874 does not permit the Railroad Company to select lieu lands which are coal lands, draws in question the construction of a law of the United States.

The Act of 1874 was passed to help homestead and other settlers who were in hard case because they had established their settlement after the grant to the Railroad Company was held to have attached. The question when it did attach was for a long time doubtful and the subject of litigation. This Act of 1874 was intended to induce the railroad companies to relinquish such lands thus illegally occupied as against them by promising in lieu thereof other lands of equal area in both odd and even sections within the prescribed limits. The act applied not only to railroad grants in which the term "lands not mineral" did not exclude iron or coal lands, as in this case, but also to similar grants, of which there were several, in which the phrase "not mineral" was used in its usual sense and excluded iron and coal. E. g., see grants to Union Pacific R. R. and Central Pacific, 12 St. 489, 492, c. cxx., § 3; Joint Resolution Jan. 30, 1865, 13 Stat. 567. It would seem to be impossible, therefore, to give a meaning to the phrase "not mineral" in the Act of 1874 which should mean including coal in some cases and excluding coal in others.

More than this, the settlers who were to be aided by the Act of 1874 were those who made homestead or preemption filings. Coal lands were not subject to such entry or disposition. As the lands which the railroad companies were invited to relinquish could not be known coal lands, it is not to be inferred that Congress intended that the railroad companies should in compensation acquire coal lands by their lieu selections.

This construction of the Act of 1874 accords with the action of the Department of the Interior since its passage. Not until this case had the precise question been mooted so as to invoke a formal decision of the Secretary; but the record discloses that it has been the uniform practice of the General Land Office in its printed forms furnished under the act to confine such lieu selections to lands not

known to contain coal, iron or other minerals, and that railroad companies generally have acquiesced therein by furnishing proofs of the non-coal and iron character of the land selected.

It has also been insisted on behalf of the Secretary that the discretion vested in him by Congress in supervising the selection of lieu lands and in executing the laws of 1866 and 1874 is quasi judicial, and that it may not be controlled through mandamus or injunction by the Courts, unless his conclusion can be said to be capricious or arbitrary, or so unreasonable as not to be debatable. To sustain this claim, the cases of *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324; *Ness* v. *Fisher*, 223 U. S. 683, 692; *Alaska Smokeless Coal Co.* v. *Lane*, 250 U. S. 549, 555, and *Hall* v. *Payne*, 254 U. S. 343, and a number of earlier cases are cited. See *Brown* v. *Hitchock*, 173 U. S. 473, 478. It may be that the authority of these cases would require us to yield to the contention made on behalf of the Secretary in this regard. We are not, however, required to decide this point. The case against the construction of the Act of 1874 urged by the Railroad Company is so clear that we prefer to put our decision directly on the merits of that issue.

Affirmed.

SANTA FE PACIFIC RAILROAD COMPANY *v.* WORK, SECRETARY OF THE INTERIOR.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 302. Argued March 18, 19, 1925.—Decided April 13, 1925.

1. The construction of a law of the United States was "drawn in question by the defendant" within the meaning of § 250, par. 6 of the Judicial Code permitting appeals to this Court from the Court of Appeals of the District of Columbia, where the Secretary of the Interior, as defendant, secured the dismissal of plaintiff's bill upon the ground that the lieu land selection in controversy was not permitted by an Act of Congress. P. 515.
2. Under the Act of June 22, 1874, providing that railroads may relinquish lands appertaining to their land grants which are found in possession of actual settlers, etc., and select an equal quantity of other lands in lieu thereof from any of the public lands "not mineral" within the limits of the grant, not otherwise appropriated

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 303

SANTA FE PACIFIC RAILROAD COMPANY, APPELLANT,

vs.

HUBERT WORK, SECRETARY OF THE INTERIOR

APPEAL FROM COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

FILED FEBRUARY 28, 1925

(29,155)

(30,155)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 302

SANTA FE PACIFIC RAILROAD COMPANY, APPELLANT,

vs.

HUBERT WORK, SECRETARY OF THE INTERIOR

APPEAL FROM COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 11, 1924

Court of Appeals of the District of Columbia.

No. 3966.

SANTA FE PACIFIC RAILROAD COMPANY, &c., Appellant,

vs.

ALBERT B. FALL, Secretary of the Interior.

a Supreme Court of the District of Columbia.

In Equity.

No. 40,558.

SANTA FE PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

ALBERT B. FALL, Secretary of the Interior, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Bill of Complaint.*

Filed September 27, 1922.

In the Supreme Court of the District of Columbia.

In Equity.

No. 40,558.

SANTA FE PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff,

vs,

ALBERT B. FALL, Secretary of the Interior, Defendant.

To the Supreme Court of the District of Columbia, Holding an Equity Court:

Your Orator complains and says:

The Santa Fe Pacific Railroad Company is a corporation incorporated under and in accordance with an act of Congress approved

March 3, 1897 (29 Stat., 622), and brings this bill of complaint against Albert B. Fall, a citizen of the State of New Mexico, residing in the District of Columbia, defendant:

I.

By Act of Congress of July 27, 1866 (14 Stat., 292), a grant of lands was made through the then territories of New Mexico, and Arizona, in aid of the construction of the Atlantic and Pacific Railroad. The line of the Atlantic & Pacific Railroad, opposite the tracts hereinafter described, was duly constructed and accepted by the President of the United States, as required by the said Act of July 27, 1866, and the grant to that extent duly earned.

2 II.

The Atlantic & Pacific Railroad Company defaulted on its bonds and the mortgage given was foreclosed and a sale effected of its properties. The purchasers under the foreclosure sale organized the Santa Fe Pacific Railroad Company, the same being in accordance with the said Act of March 3, 1897, supra, and said company became possessed of all the rights granted by the said Act of July 27, 1866.

III.

The S. E. ¼ of the N. E. ¼ of Sec. 13, T. 15 N., R. 13 W., Arizona, is within the primary or place limits of the grant made by the said Act of July 27, 1866, as adjusted to the line of definite location, and the same duly inured to the company on account of its grant.

The grant made by the said Act of July 27, 1866, was of:

"Every alternate section of public land, not mineral, designated by odd-numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections per mile, on each side of said railroad whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preemption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; * * *

And, provided, further, That the word 'Mineral,' when it occurs in this act, shall not be held to include iron or coal;" etc.

IV.

3 The tract hereinbefore described was settled upon after the right of the road had attached thereto under its grant upon definite location, and in order to protect the settler the Santa Fe Pacific Railroad Company was, by the Secretary of the Interior, requested to relinquish its claim to said land under the Act of June 22, 1874 (18 Stat., 194), and in accordance with said request the

Santa Fe Pacific Railroad Company duly relinquished its claim to said land which was accepted by the Secretary of the Interior May 25, 1917, and the land so relinquished has been disposed of by the United States.

V.

By the said Act of June 22, 1874, supra, it was provided:

"That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the preemption or homestead laws of the United States, subsequent to the time at which, by the decision of the land-office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: Provided, That nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to any such railroad or to extend to lands reserved in any land grant made for railroad purposes."

VI.

December 1, 1921, the Santa Fe Pacific Railroad Company, in accordance with the provisions of the Act of June 22, 1874, supra, and on account of relinquishment of the tract hereinbefore de-
4 scribed, duly filed in the local land office at Santa Fe, New Mexico, a selection of the N. E. ¼ of N. W. ¼ of Sec. 32, T. 16 N., R. 18 W., New Mexico, a tract within the limits of its grant, equal in quantity to the tract relinquished, and not otherwise appropriated at the date of selection, which selection was duly accepted by the District Land Officers, but upon consideration thereof by the Secretary of the Interior, in his decision rendered July 25, 1922, copy of which is attached hereto and marked "Plaintiff's Exhibit A," the said Secretary of the Interior rejected said selection solely upon the ground that the tract selected is believed to contain valuable deposits of coal.

VII.

Thereafter, the Santa Fe Pacific Railroad Company moved a rehearing of the matter, which was denied by the Secretary of the Interior, acting through his First Assistant, under date of August 24, 1922, copy of the order of denial of the said motion being attached hereto and marked "Plaintiff's Exhibit B".

VIII.

Plaintiff is advised and therefore alleges that, as by the said granting act of July 27, 1866, the grant was of all lands not mineral in character, with a provision, however, that the word "Mineral" should not include iron or coal, and as it was provided by the said Act of June 22, 1874, supra, that, upon relinquishment to protect an actual settler after the right of the road had been declared to attach to the lands settled upon, the company should receive title to
5 the land taken in lieu as though originally granted, the Secretary of the Interior exceeded his authority when he took into consideration, and for that reason rejected, the selection, because of the possibility of the said lieu lands containing a valuable deposit of coal. And the plaintiff further alleges that it has exhausted every remedy available under the practice before the Interior Department, and that the threatened action of the defendant in the cancellation of the selection previously allowed is without just cause, and unless restrained will deprive the plaintiff of a valuable part of the land grant heretofore made by Congress, and will further result in the unlawful application and disposition of said lands by the defendant to other purposes than under the grant aforesaid, to the irreparable loss, damage and injury of the plaintiff, for which there is no adequate remedy at law, and the plaintiff is therefore remediless except in equity;

Wherefore, the Plaintiff prays: That Your Honor grant your writ of injunction, enjoining the defendant, Albert B. Fall, Secretary of the Interior as aforesaid, his successors in office, and all persons claiming to act under his authority and control, absolutely to desist and refrain from cancelling the lawful selection made by the plaintiff in partial satisfaction of its grant fully earned, until Your Honor shall appoint and direct and order herein; and that upon such hearing, the writ herein prayed be granted and continued until the final determination of this suit; and upon such final hearing be made permanent, and that Your Honor do command the said
6 defendant, Albert B. Fall, Secretary of the Interior as aforesaid, to recall the order for the cancellation of the selection hereinbefore duly and lawfully made, and to refrain from further action respecting the lands selected, except to issue patent therefor under the said grant to the end that the rights of the plaintiff in the premises may be respected and legally recognized as by the said grant provided.

To the end that the defendant may, if he can, show why your orator should not have the relief hereby prayed, and may make full, true and perfect answer, according to the best of his knowledge, remembrance, information and belief, to the several matters herein before averred and set forth, as fully and particularly as if the same were herein repeated paragraph for paragraph, and he was thereto specifically interrogated (but not under oath, an answer under oath being hereby expressly waived), may it please Your Honor to grant unto your orator a writ of subpœna *ad respondem*, issuing out of and under the seal of this Honorable Court, directed

to the said defendant, Albert B. Fall, commanding him to be and appear and make answer unto this bill of complaint, and perform and abide by such order and decree herein as to this Court may seem to be required by the principles of equity and good conscience.

And that your Orator may have such other or further relief in the premises as the nature of the circumstances of the case may require.

ALEXANDER BRITTON,
F. W. CLEMENTS,
Attorneys Santa Fe Pacific Railroad Company.

7 Copy of the within bill of complaint this day, Sept. 27, 1922, received.

C. EDWARD WRIGHT,
Attorney for Defendant.

"PLANTIFF'S EXHIBIT A."

Department of the Interior,

Washington.

July 25, 1922.

Address Only The Secretary of the Interior.

M—7382. "G."

Santa Fe 043511 to 043518, Inclusive.

Santa Fe Pacific Railroad Co.

Instructions Submitted by the General Land Office.

The Commissioner of the General Land Office has submitted for instructions the question whether the Santa Fe Pacific Railroad Company is entitled to select coal lands under the conditions stated in his letter of March 24, 1922, as follows:

December 1, 1921, there were filed in the Santa Fe, New Mexico, land office under the act of June 22, 1874 (18 Stat., 194), as amended by the act of August 29, 1890 (26 Stat., 369), by the Santa Fe Pacific Railroad Company as successor in interest of the Atlantic and Pacific Railroad Company, the following selections.

8

		Selects, New Mexico.				Base, Arizona.				
Serial.	Sub.	Sec.	T. N.	R. W.	Area.	In lieu of sub.	Sec.	T. N.	R. W.	Area.
043513	NE ¼NW¼..	32	16	18	40.00	SE ¼NE ¼..	13	15	13	40.00
043512	NW¼NW¼..	"	"	"	"	NE ¼SW¼..	27	16½	13	"
043511	SE ¼NW¼..	"	"	"	"	NE ¼NE ¼..	13	15	13	"
043518	SW¼NW ¼..	"	"	"	"	SE ¼SW ¼..	27	16½	13	"
043514	NE ¼SW ¼..	"	"	"	"	NW¼NE ¼..	13	15	13	"
043517	NW¼SW ¼..	"	"	"	"	NW¼NW¼..	13	15	13	"
043515	SE ¼SW ¼..	"	"	"	"	SE ¼SE ¼..	11	15	13	"
043516	SW ¼SW ¼..	"	"	"	"	NE ¼NW ¼..	13	15	13	"

As set out in above all these selections were filed December 1, 1921. The lands selected were originally withdrawn from all entry as possible coal lands on July 26, 1906, and such order was modified later in 1906 to apply to coal entry merely. On August 25, 1915, the land was embraced in coal withdrawal No. 8. By Executive order of February 18, 1918, the S. E. ¼ N. W. ¼, E. ½ S. W. ¼, S. W. ¼ S. W. ¼, was classified as coal at $135.00 per acre and the N. W. ¼ S. W. ¼, N. — N. W. ¼, S. W. ¼ N. W. ¼ at $133.00 per acre. The company has filed affidavits showing the lands to be nonmineral other than coal or iron and the Geological Survey in its reports on the cases corroborates such fact. At the time the applications were filed the State's claim to the tracts under its school land grant by the act of June 20, 1910 (36 Stat., 557), was not determined but the State's right was finally denied on the ground that such tracts were mineral (coal) on January 25, 1922. The lands offered as bases contain no coal or other minerals so far as the records of this office show and have been all patented to individuals. The selected and base lands are within the primary limits of the grant to the railroad and except for the coal character of the selected land, there appears no reason why the selection should not be allowed.

Section 3 of the act of July 27, 1866 (14 Stat., 292), granted to the Atlantic and Pacific Railroad Company, its successors and assigns, the odd-numbered sections within 40 miles on each side of its road through the Territories of the United States, where the Government had full title, not reserved or otherwise appropriated, and free from adverse claim at the time of the location of the road; also in case of adverse claim, reservation, or disposal prior to that time of any of said sections or parts of sections, the company was authorized to select other land in lieu thereof, in alternate sections,
9 not more than 10 miles beyond the limits of the primary grant. The section further provides:

* * * *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of the road, and within 20 miles thereof, may be selected as above provided: *And provided further*, That the word "mineral" when it occurs in this act, shall not be held to include iron or coal.

The act of June 22, 1874 (18 Stat., 194), provides in part as follows:

That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the preemption or homestead laws of the United States subsequent to the time at which, by the decision of the land-office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of

the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: Provided, That nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to any such railroad or to extend to lands reserved in any land grant made for railroad purposes.

The act of August 29, 1890 (26 Stat., 369), extended the provisions of the said act of June 22, 1874, to homestead and preemption claims, after residence and improvement for five years, but which for any cause have not been admitted to record.

The particular question involved in this case is whether lands withdrawn by the Government for classification and valuation, and thereafter, prior to the date of selection, are classified and valued as coal lands at $133 and $135 per acre, are subject to selection and patent under said act of June 22, 1874. While the granting
10 act of July 27, 1866, *supra*, expressly provides that the exception of mineral lands from the place and indemnity grant "shall not be held to include iron or coal," the act of June 22, 1874, *supra*, provides that the company may select in lieu of the lands surrendered "an equal quantity of other lands * * * upon any of the public lands not mineral and within the limits of the grant * * *." In short, the act of June 22, 1874, provides that mineral lands shall not be subject to selection thereunder and does not, like the act granting lands to the railroad company in place or indemnity limits, contain the provision that the word "mineral" when it occurs in the act "shall not be held to include iron or coal."

It is, therefore, incumbent upon the Department to ascertain the intent of Congress in this particular, and to consider not only the language but the purpose congress had in mind, as well as the effect of the language used in the several acts. The granting act, designed to encourage and aid the railroad company in the construction and operation of its line, was enacted at a time when coal was the chief, if not the only, fuel used in the operation of railroads. Iron in manufactured form was and is used for the rails and other items involved in the construction and operation of a railroad. Therefore, Congress in granting to the company specified lands within defined limits, and excepting minerals therefrom, added another specific exception or clause to the act, which had the effect of granting to the railroad company any odd-numbered sections of public lands within its primary or indemnity limits containing deposits of iron or coal.

11 The act of June 22, 1874, is not a grant of lands in place, nor is it an indemnity grant in the ordinary sense of that term. It relates to lands which passed to the railroad company under its grant and which the company had a right to keep and hold thereunder. The act was an equitable or relief law, designed to permit the railroad company at its option to recognize the equitable claim of a preemption or homestead settler or entryman, relinquishing its claim to the lands which had inured to it under its grant, in

favor of such settler or entryman, and to select in lieu thereof an equal quantity of other public lands not "mineral" and located anywhere within the limits of the company's grant. It will be seen that the act is in the nature of a lieu selection act, not limited to odd-numbered sections, but applicable to any lands of the character described within the exterior limits of the company's grant. The bases of these lieu selections are not mineral, coal, or iron, but agricultural claims, for at the date of the passage of the act of 1874 preemption and homestead entries could not be made upon lands of the United States valuable for their deposits of coal or iron. The same is true at the present time, as a homestead or preemption entryman can not acquire title to public lands of the United States known to be valuable for coal or iron, lands valuable for iron not being subject to entry at all under said laws, and lands containing coal being subject to entry under said laws only when the entryman expressly agrees to a reservation of the coal deposits to the United States, with the right of the United States, or its lessees, to enter upon, mine, and remove the same.

12 It, therefore, seems to follow clearly that Congress intended to limit these lieu selections to the same character of lands or rights which could be acquired under the homestead or preemption laws, and which the company recognized, by the surrender of its vested right. In other words, that the lieu selections which the railroad company was authorized to make would be of lands "not mineral" and that this term as used in the act of June 22, 1874, meant that lands containing coal or iron, as well as lands containing other minerals, could not be selected thereunder. This view is supported by the fact that in the granting act, in order to permit the railroad company to take lands containing coal or iron, the Congress deemed it necessary to insert an express provision to that effect; while in the act of June 22, 1874, it made the broad exclusion of all minerals, and placed in the act no express language which would warrant the conclusion that it intended to permit the railroad company, in making these optional lieu selections, to take public lands valuable for iron or coal.

This construction of the act of June 22, 1874, comports with the policy of Congress and with the decisions of this Department in the case of other lieu selections or lieu scrip acts, the effect of which has uniformly been to exclude from selection, lands valuable for coal, iron, or other minerals.

The case under consideration sharply illustrates the result of a contrary construction. Lands of a probable value of from $1.25 to $3 per acre are offered on December 1, 1921, as a basis for the selection of lands of the United States included in a coal with-

13 drawal August 25, 1915, and classified by Executive order of February 8, 1918, as containing coal of the value of from $133 to $135 per acre.

I can not conceive that Congress intended that a lieu selection, based upon nonmineral lands of trivial value, could be made for mineral lands of the value of those here involved. While I do not find that the precise question has been determined by the Secretary

of the Interior, I find that it has been the uniform policy of the General Land Office to confine such selections to lands not known to contain coal, iron, or other minerals, and that other railroad companies have acquiesced therein by furnishing proofs of the noncoal or iron character of the land. This construction, in my opinion, harmonizes and is in full accord with the language, purpose, and effect of the said act of June 22, 1874.

It is accordingly held that lands of the United States known to be valuable for their deposits of coal or iron are not subject to selection under the act of June 22, 1874, *supra,* as amended by the act of August 29, 1890, *supra.*

(Signed) E. C. FINNEY,
First Assistant Secretary.

Secretary Fall's Concurring Opinion.

I have concurred in the conclusions arrived at by First Assistant Secretary Finney, in re Santa Fe 043511 to 043518 inclusive.

In addition to the reasoning set forth by Judge Finney
14 as the basis for his conclusions, I am impelled to my acquiescence therein, to a very considerable degree, through consideration of matters casually referred to by Judge Finney, to wit:

The application for the location of this scrip was made in 1921.

Up to the year 1915 no such application had been made for these lands, in so far as I am aware. In that year these lands, among others, were withdrawn by Executive Order both under Executive power and under provisions of the Act of 1910.

During the period that these lands were withdrawn their status had been affected so that location of such scrip could not have been made thereupon, nor could any other entry have been so made, except subject to the results of the classification and price-fixing for which purposes the lands had been withdrawn.

In my judgment, this withdrawal and classification of these lands had an effect upon the status thereof, which must be considered in a decision of the case now before us.

In other words, prior to the attempted location of this scrip, before any rights of any kind had been acquired or claimed in the lands by the owners or locators of the scrip, the Government of the United States had intervened, withdrawing the lands and classifying them for sale.

When these lands were restored, they were restored to be sold at the valuation thereof and this status undoubtedly remained the
actual status of the lands in question until the law itself
15 should have been changed.

In February, 1920, the law *was* changed, and provision was made for the acquisition of such lands by lease properly made under the terms of the last Act.

Such lease could be made under Section Two of the Act of February 25th, 1920.

Under Section Thirty-seven of the same Act, it is provided that deposits of coal, phosphates, sodium, etc., "shall be subject to dis-

position only in the form and manner provided in this Act, except as to valid claims existent at date of passage of this Act, etc."

Now, it is apparent that the claim in question was not initiated as to this particular land until after the passage of the Act of February 20th. It could only be sustained upon the ground that under the Act of 1874, any lands upon which such lien scrip might be located thereafter, could be charged with a private right wherever found, which would remove such lands from the provisions of the Act of 1920. The Act of 1874 created no such vested right.

Therefore, the claim in question, not having such status as that provided in Section 37 of the Act of 1920, that is, the status of a "valid claim existent at date of passage of this Act" (1920), the only method by which title could be obtained to the lands in question would seem to be under the provisions of Section 2 et seq., of the latter Act.

I am inclined to hold that the parties claimant have proceeded in good faith in so far as their sincerity of purpose is concerned, in insisting upon their right to locate this scrip, and I presume
16 that your records will show development of the land in question.

If you find such good faith to exist and to be borne out by acts of the claimants, you would, in my judgment, be at liberty to consider such matter in fixing the lease rental upon these premises, and to "recognize equitable rights of such occupants or claimants."

Of course, this would not relieve from the necessity of advertising the proposed lease, but I think such facts, if established, would justify your notifying the parties that a filing of an application for lease if made by them immediately, say within thirty or sixty days, being based upon recognition of some equitable right of theirs, will be considered both in the matter of priorities and equities in passing upon such application.

(Signed) ALBERT B. FALL,
Secretary.

Rule to Show Cause.

Filed September 27, 1922.

* * * * * * *

Upon consideration of the bill of complaint herein, and upon application in that behalf made, it is, by the Court, this 27th day of September, 1922, ordered:

That Albert B. Fall, Secretary of the Interior, defendant, show cause to this Court if any he has, on the 3d day of November A. D., 1922, at 10.00 o'clock a. m., why preliminary injunction and restraining order should not issue as prayed in said bill of com-
17 plaint; provided, a copy of said bill and of this rule to show cause be served upon said defendant, on or before the — day of ——, A. D., 1922.

WALTER I. McCOY,
Chief Justice.

Copy of the within Rule to Show Cause this day, Sept. 27, 1922, received.

C. EDW. WRIGHT,
Attorney for Defendant.

Motion to Dismiss.

Filed October 31, 1922.

* * * * * * *

Comes now the defendant by his attorney and moves to dismiss the bill of complaint herein filed; and for cause shows:

(1) That the bill fails to state facts which entitle the plaintiff to the relief sought or to any relief in equity.

(2) That the bill seeks to control the disposition of public land of the United States, a matter within the exclusive jurisdiction of the defendant, and not within the jurisdiction of the court.

(3) That it appears on the face of the bill that the validity of plaintiff's selection depends upon a question of fact and a question of law involving the construction of a statute with administration of which the defendant is charged by law; that the defendant
18 has decided that at the time of plaintiff's selection the land was mineral in character; that the defendant has further construed the statute under which plaintiff made said selection as excluding mineral land from the terms of its grant; and that said construction is not only a possible but is a reasonable construction of the law and is not subject to review by the courts.

ALBERT B. FALL,
Secretary of the Interior,
By His Attorney, C. EDWARD WRIGHT,
Attorney.

Memorandum Opinion.

Filed December 28, 1922.

* * * * * * *

It seems to me on a further examination of the Act of June 22, 1874 (18 Stat. 194) that whatever Congress meant by the words "to which they shall receive title the same as though originally granted" it was not intended to limit the meaning that would ordinarily be conveyed by use of the words "not mineral." Had Congress intended otherwise it would have done at it did in the act making the grant to the railroad—that is to say would have provided that the word "mineral" should not be held to include iron or coal.

This interpretation which is that of the Secretary of the Interior does not work a seeming injustice as the surrendered land was undoubtedly supposed not to contain coal or iron.

19 Even though the Court should think that the interpretation placed on the Act of 1874 by the Secretary is not correct as it is a possible interpretation and so not arbitrary it must stand.

The land selected by the railroad company might before selection have been withdrawn by the Executive so as not to be available for selection or occupation for any private purpose. It follows as was held by the Secretary that where the land was by Executive order withdrawn before selection and later restored to be occupied only on terms inconsistent with the claimed right its right no longer exists.

The prayers for relief are denied.

WALTER I. McCOY,
Chief Justice.

Decree Dismissing Bill.

Filed January 4, 1923.

* * * * * * *

This cause came on to be heard on defendant's motion to dismiss the plaintiff's bill of complaint and was argued by counsel; Whereupon, the court being fully advised in the premises, it is, this 4th day of January, 1923,

Ordered, adjudged, and decreed, That the rule to show cause herein issued be, and the same is, hereby discharged, that the bill of complaint be, and the same is, hereby dismissed, and that
20 defendant have judgment for his reasonable costs to be taxed by the Clerk.

By the court:

WALTER I. McCOY,
Chief Justice.

And now on the day last above written the plaintiff in open court notes an appeal from the aforegoing decree to the Court of Appeals, and the same is hereby allowed; and the penal sum of the bond for costs on appeal is hereby fixed at $100, with leave to deposit $50 cash, in lieu thereof, with the Clerk.

By the Court:

WALTER I. McCOY,
Chief Justice.

O. K. as to form:
F. W. CLEMENTS,
Atty. for Plff.

Memorandum.

January 9, 1923.—Bond on appeal for $100 approved and filed.

Assignments of Error.

Filed January 9, 1923.

* * * * * * *

The appellant, Santa Fe Pacific Railroad Company, a corporation, hereby designates the following assignments of error in a certain final decree of the Court entered in the above entitled cause
21 on January 4, 1923, dismissing the bill of the complainant filed herein by plaintiff:

I.

In failing to find and hold that, in determining the rights of the plaintiff under the act of June 22, 1874 (18 Stat., 194), the same must be construed as in pari materia with the granting act of July 27, 1866 (14 Stat., 292); and that when so construed, the words "not mineral" did not exclude from selection lands containing valuable deposits of coal or iron.

II.

In holding that withdrawal of lands in order to classify the same with respect to the coal contents and restoration after such classification, took such lands out of the class of lands subject to selection under said act of June 22, 1874.

III.

In holding that the provision in the act of June 22, 1874, providing that the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral, and within the limits of the grant not otherwise appropriated at the date of the selection, "to which they shall receive title the same as though originally granted," was not intended to limit the meaning that ordinarily would be conveyed by the use of the words "not mineral", and that "had Congress intended otherwise it would
22 have done as it did in the act making the grant to the railroad,—that is to say, would have provided that the word 'mineral' should not be held to include iron or coal."

IV.

In holding that its decision "does not work a seeming injustice, as the surrendered land was undoubtedly supposed not to contain coal or iron."

V.

In holding that the interpretation of the act of 1874 by the defendant even if incorrect, is a possible interpretation and so not arbitrary, and must stand.

VI.

In failing to hold that the act of June 22, 1874, *supra,* was a general act applying to all railroad land grants, and that its purpose was, upon relinquishment as provided for in said act, to place each company with respect to selections made thereunder in the same position as though selection had been made under the original granting act.

VII.

In failing to hold that to have included a general provision in the Act of June 22, 1874, that the word "mineral" should not be held to include iron or coal, would have worked a change in the larger number of the public land grants in aid of the construction of railroads in this, that only a few of such grants,—namely, the Transcontinental grants,—contained any such provision.

VIII.

In discharging the rule to show cause and in granting
23 defendant's motion to dismiss plaintiff's bill filed for the purpose of restraining the defendant from cancelling plaintiff's selection of lands of the character subject to selection under its grant, and the act of June 22, 1874.

IX.

In failing to grant to plaintiff the relief prayed against the acts of the defendant in attempted cancellation of a valid selection in lieu of a relinquishment of a tract fully earned by construction of the railroad, as provided for in the granting act.

X.

In failing to grant the injunction prayed for by appellant, and in dismissing its bill of complaint.

XI.

Other errors apparent on the face of the record herein.

F. W. CLEMENTS,
Attorney for Appellant.

Service of copy of the above assignments of error acknowledged this 8 day of January, 1923.

EDWIN S. BOOTH,
Attorney for Defendant.

24 *Designation of Record on Appeal.*

Filed January 9, 1923.

* * * * * * *

To the Clerk of the Supreme Court of the District of Columbia:

On behalf of the above named Santa Fe Pacific Railroad Company, a corporation, plaintiff and appellant, I request that you will cause to be prepared the transcript of record on appeal in the above entitled cause, and I hereby designate the following to be included in said transcript:

(1) Bill of complaint with exhibit attached thereto, marked Exhibit A.
(2) Rule to show cause.
(3) Motion of defendant to dismiss bill of complaint.
(4) Memorandum opinion of the Court.
(5) Decree discharging rule to show cause and dismissing the bill of complaint, including endorsement thereon of appeal in open court, and order fixing amount of appeal bond for costs.
(6) Assignment of appeal.
(7) Memorandum of approval and filing of bond for costs on appeal.
(8) This designation.

F. W. CLEMENTS,
Attorney for Appellant.

Service of copy of above designation acknowledged this 8 day of January, 1923.

EDWIN S. BOOTH,
Attorney for Defendant.

25 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 24, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 40558 in Equity, wherein Santa Fe Pacific Railroad Company, a Corporation, is Plaintiff, and Albert B. Fall, Secretary of the Interior, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 20th day of February, 1923.

[Seal of the Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
Clerk,

By W. E. WILLIAMS,
Assistant Clerk.

EW.

Endorsed on cover: District of Columbia Supreme Court. No. 3966. Santa Fe Pacific Railroad Company, etc., appellant, vs. Albert B. Fall, Secretary of the Interior. Court of Appeals, District of Columbia. Filed Feb. 23, 1923. Henry W. Hodges, Clerk.

(8656.)

IN COURT OF APPEALS

No. 3966

SANTA FE PACIFIC RAILROAD COMPANY, a Corporation Appellant,

vs.

HUBERT WORK, Secretary of the Interior

ARGUMENT AND SUBMISSION

The above entitled cause was submitted to the consideration of the Court on the printed record and brief filed herein by Mr. F. W. Clements, attorney for the appellant, and was argued by Mr. C. E. Wright, attorney for the appellee. On motion, the appellant is allowed to file a reply brief herein within five days, with leave to appellee to answer same if so advised.

IN COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

[Title omitted]

Before Robb and Van Orsdel, Associate Justices, and Barber, Judge of the U. S. Court of Customs Appeals

OPINION

Mr. Justice VAN ORSDEL delivered the opinion of the Court:

Appellant Railway Company, plaintiff below filed its bill in the Supreme Court of the District of Columbia praying an injunction to restrain defendant, the Secretary of the Interior, from cancelling a selection of public land made by it in lieu of land relinquished from the original grant made by the Government.

From a decree sustaining defendant's motion to dismiss, discharging the rule to show cause, and dismissing plaintiff's bill, this appeal was taken.

By the Act of July 27, 1866, 14 Stat. 292, a grant of land was made by the United States to aid in the construction of the Atlantic and Pacific Railroad which has since passed into the ownership of the plaintiff railway company. The grant consisted of the odd numbered sections within a territory extending twenty miles on either side of the railway tracks, known as the primary or place limits of the grant. The Act provided for a right of indemnity within an enlarged limit, from which the railway company might select lands in lieu of lands that had already been settled or disposed of within the place limits prior to the location of the line of railway. The grant consisted of "public lands not mineral" with

the further provision "that the word 'mineral' when it occurs in this Act shall not be held to include iron or coal." No provision was made for the taking of indemnity lands except in lieu of lands which had been settled upon or disposed of within the place limits prior to the definite location of the road.

By the Act of Congress of June 22, 1874, 18 Stat. 194, it was provided: "That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the pre-emption or homestead laws of the United States subsequent to the time at which, by the decision of the land-office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: Provided, That nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to any such railroad or to extend to lands reserved in any land grant made for railroad purposes."

In the present case, the land which constitutes the base for the selection here in question, was settled upon after the rights under the original grant had attached; and to protect the settler the railway company was requested by the Secretary of the Interior to relinquish the claim, as provided by the Act of 1874, and select other lands in lieu thereof. The relinquishment by the railroad company was accepted by the Secretary of the Interior May 25, 1917, and the patent of the United States has passed to the settler.

The sole question in this case is the right of the railway company to select, in lieu of the land relinquished, lands known to be possessed of valuable coal deposits. It is the contention of plaintiff company that inasmuch as the Act of 1866 excepted from its mineral provisions iron or coal, that the Act of 1874, permitting the selection of lieu lands not mineral, is likewise to be interpreted as exempting from its mineral provisions iron or coal. We think this contention cannot be sustained, and that so far as the mineral limitation is concerned, the Act of 1874 must be construed without reference to the original granting act. It deals with a situation not contemplated by or embraced within the provisions of the original act. No involuntary condition was forced upon the railway company. It merely provided that in the event of settlement on the railway lands, the railway company might relinquish to the Government in favor of the settler, and select, in lieu of the lands relinquished, lands equal in quantity and value. To this end, when Congress limited the lands open to selection, to those nonmineral in character, it imposed no obligation or hardship upon the railway company, nor

divested it of any right granted under the original act. The railway company was not obligated to relinquish its title to any land under the provisions of the 1874 Act. It had the option to retain or relinquish. If it relinquished, it could select any land not mineral within the exterior limits of the grant. It was not limited to odd numbered sections, as in the case of indemnity lands under the original act; it in no way enlarged the original grant, indeed that was expressly inhibited. It applied only to agricultural lands settled under the pre-emption or homestead laws. Such land could only be relinquished, and, under a reasonable interpretation, we think only such land could be taken in lieu thereof.

The Act of 1874 was general in its terms. The term "not mineral" was not qualified by any provision as to coal or iron as in the original act. It applied to all railway grants, although in many of such grants the nonmineral provision was not qualified to the extent of exempting therefrom iron or coal. If we are to import the mineral limitations of the Act of 1866 into the Act of 1874, why not limit the right of selection under the latter act to odd numbered sections. The act contains no such limitation, and indeed the selection in this instance is from an even numbered section. We think, therefore, that to sustain the contention of plaintiff, would be to enlarge the scope of the act, and read into it conditions not justified by the language of the act itself, or of the original act, or to be inferred from any intention manifested by Congress.

Counsel for appellant company lay stress upon the clause of the Act of 1874 which provides that, as to lieu lands selected and approved, the railroad company "shall receive title the same as though originally granted." This refers merely to the kind of title and the avenue through which it shall pass, and does not relate to the quality of land to be selected, or invest the railroad company with any right of selection equivalent to that provided in the original grant. They are words of conveyance, not of power.

But plaintiff company is confronted by still another difficulty. The selection in question was not made until December 1, 1921. It was, therefore, preceded by the Act of February 20, 1920, 41 Stat. 437, which withdrew the coal lands of the United States from sale and provided that they could only be disposed of by lease. Certain lands were excepted from the provisions of the Act, but the land here in question is not affected thereby. This particular land had been withdrawn under the Act of 1920, and was not, therefore, subject to selection in December 1921. The railway company in 1917 when it relinquished its title to the base land, acquired merely a right to select land in lieu thereof as provided in the Act of 1874. The obligation assumed by the United States upon the relinquishment of the base land, was only to give proper and available lieu land in exchange therefor. It must, however, be proper and available lieu land on the date of its selection, not necessarily of the date of relinquishment. "An indemnity grant, like the residuary clause in a will, contemplates the uncertain and looks to the future. What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may elect when its right

to indemnity is determined depends on the state of the lands selected at the moment of choice. Of course the railroad is limited in choosing by the terms of the indemnity grant, but the so-called grant is rather to be described as a power. Ordinarily no color of title is gained until the power is exercised." United States vs. Southern Pacific Railway, 223 U. S. 5 5, 571.

Inasmuch, therefore, as the railway company made no claim to the land in question prior to the Act of 1920, and since its right to indemnity "depends on the state of the lands selected at the moment of choice," it follows that plaintiff is foreclosed from selecting the lands in question both by the Act of 1874 and the Act of 1920.

The decree is affirmed with costs.

Josiah A. Van Orsdel, Associate Justice.

IN COURT OF APPEALS

[Title omitted]

Appeal from the Supreme Court of the District of Columbia

JUDGMENT—Filed Feb. 5, 1924

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. Justice Van Orsdel, February 5, 1924.

Judge Orion M. Barber of the U. S. Court of Customs Appeals sat in this case in the place of Mr. Chief Justice Smyth.

IN COURT OF APPEALS, DISTRICT OF COLUMBIA

[Title omitted]

PETITION FOR APPEAL—Filed Feb. 12, 1924

Comes now the appellant, the Santa Fe Pacific Railroad Company, by its attorneys and moves the Court to allow an appeal to the Supreme Court of the United States to review the decision of this court herein and to stay mandate and for cause shows:

I

The appeal lies under paragraph V of Sec. 250 of the Judicial Code, in that the scope of the power of the Secretary of the Interior over the selection in question as well as the duty of that officer with respect to such selection is directly drawn in question in these proceedings.

II

The appeal lies under paragraph VI of Sec. 250 of the Judicial Code in that the construction of the act of June 22, 1874 (18 Stat. 194) is brought in question by the defendant who asserts and relies upon that act for denial of approval to the selection of the land involved because of supposed coal value in the land notwithstanding, under the terms of the act of July 27, 1866 (14 Stat. 392) making the grant to the predecessor of the plaintiff company, it is specifically provided "that the word mineral when it occurs in the act shall not be held to include iron and coal."

F. W. Clements, Alex. Britton, Attorneys for Appellant Company.

That a bond to act as a supersedeas be fixed in the sum of three Hundred dollars.

Service of above motion together with the assignment of errors acknowledged this 12th day of February, 1924.

C. E. Wright, Atty. for Appellee.

[File endorsement omitted.]

IN COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Feb. 12, 1924

The appellant hereby assigns the following errors in the decision of the Court in the above entitled cause:

I

The Court erred in finding and holding that appellant was limited by the Act of June 22, 1874 to the selection of lieu lands "equal in quality and value."

II

The Court erred in finding and holding that "this particular land had been withdrawn under the Act of 1920, and was not, therefore, subject to selection in December, 1921."

III

The Court erred in holding in effect, because the Act of 1874 was general and applied to all railway grants, in many of which the non-mineral provision was not qualified to the extent of exempting therefrom coal and iron, therefore the term "non-mineral" as found in the said Act of 1874 was not qualified by the provisions as to coal and iron as in the act of July 27, 1866, making the original grant under which appellant claims.

IV

The Court erred in failing to consider and grant the main contention of appellant, namely, that the effect of the Act of 1874 was to incorporate in each of the railroad grants, an additional indemnity provision to protect errors in administering the grant through allowance of claims on railroad lands after rights had attached under the grants, and must, therefore, be considered as in pari materia with the original granting act in each case when determining rights thereunder.

V

The Court erred in holding to the prejudice of appellant the fact, that is relinquishment to protect one thus misled was voluntary, when nothing more could have been exacted of the grantee claimant, and in effect, therefore, penalizing the grantee because of its generosity.

VI

The Court erred in failing to hold that the Act of February 25, 1920, merely provided for a new method in the disposition of public lands containing coal, that is, by leasing for removal of deposits, rather than actual sale of the lands including said deposits, and that said Act in no wise changes the status of any such lands falling within railroad grants or withdrew them from the full operation of such grants, prior to permit, lease or right actually initiated thereunder, and in this regard failed to notice the expressed purpose of the Act as found in Section 20 of said Act.

VII

The Court erred in affirming the decree of the Supreme Court of the District of Columbia, dismissing plaintiff's bill and discharging the rule issued thereon.

VIII

The Court erred in failing to grant the plaintiff relief as prayed for in its bill filed in this cause, as against the unwarranted act of the defendant in withholding the approval of plaintiff's selections made as therein complained of.

F. W. Clements, Alex Britton, Attorneys for Appellant.

[File endorsement omitted.]

In Court of Appeals

[Title omitted]

Order Allowing Appeal

On consideration of the motion for the allowance of an appeal to the Supreme Court of the United States in the above entitled cause

and to stay the mandate until further order, It is ordered by the Court that said motion be, and the same is hereby, granted, and the bond to act as supersedeas is fixed at the sum of three hundred dollars.

BOND ON APPEAL FOR $300—Approved and filed Feb. 20, 1924; omitted in printing

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CITATION—In usual form, showing service on C. Edward Wright; filed Feb. 20, 1924; omitted in printing

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IN COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed Feb. 27, 1924

To Harry W. Hodges, Esq., Clerk Court of Appeals, District of Columbia:

DEAR SIR: On behalf of the above named Santa Fe Pacific Railroad Company, a corporation, plaintiff and appellant, I request that you will cause to be prepared the transcript of record on appeal in the above entitled cause; and I hereby designate the following to be included in said transcript:

1. The Printed Record.
2. Opinion of Court of Appeals.
3. Motion for appeal to the United States Supreme Court.
4. Order granting appeal.
5. Specification of error.
6. Bond with approval noted.
7. This designation.

F. W. Clements, Attorneys for Appellant.

Service acknowledged Feb. 26, 1924. C. Edward Wright, Atty. for Appellee.

[File endorsement omitted.]

IN COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

CLERK'S CERTIFICATE

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 36, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Santa Fe Pacific Railroad Company, a corporation, Appellant, vs. Hubert Work, Secretary of the Interior, No. 3966, January Term, 1924, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 27th day of February, A. D. 1924.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal of the Court of Appeals, District of Columbia.)

Endorsed on cover: File No. 30,155. District of Columbia Court of Appeals. Term No. 302. Santa Fe Pacific Railroad Company, appellant, vs. Hubert Work, Secretary of the Interior. Filed February 28th, 1924. File No. 30,155.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 302.

SANTA FE PACIFIC RAILROAD COMPANY,
Appellant

vs.

HUBERT WORK, SECRETARY OF THE INTERIOR,
Appellee.

APPEAL FROM THE COURT OF APPEALS,
DISTRICT OF COLUMBIA.

ALEX. BRITTON,
F. W. CLEMENTS,
Attorneys, Santa Fe Pacific Railway Company.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

ACTS OF CONGRESS.

CASES.

TOPICS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 302.

SANTA FE PACIFIC RAILROAD COMPANY,
Appellant

vs.

HUBERT WORK, SECRETARY OF THE INTERIOR,
Appellee.

APPEAL FROM THE COURT OF APPEALS, DISTRICT OF COLUMBIA.

This case comes before the court upon appeal from the decision of the Court of Appeals of the District of Columbia, 295 Federal Reporter 982, affirming the decision of the Supreme Court of the District of Columbia sustaining appellee's motion to dismiss, discharging the rule to show cause, and dismissing the plaintiff's bill. Record page 17.

The bill filed in this cause seeks to restrain the Secretary of the Interior from carrying into effect his decision ordering the cancellation of a certain selection made by appellant company under the act

of June 22, 1874, 18 Stat. 194, in lieu of a tract to which the company's right was held to have attached under the granting act of July 27, 1866, 14 Stat. 292, and which was relinquished on the request of the Secretary of the Interior.

By the said act of July 27, 1866, a grant was made to aid in the construction of the Atlantic & Pacific Railroad, which grant passed to the Santa Fe Pacific Railroad Company, appellant herein. The grant was of odd-numbered sections within the primary or place limits, with a right to indemnity within an enlarged limit for disposal in place made *prior* to the definite location of the company's line of road. The grant was of "*public lands* not mineral." But it was specifically provided "that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal."

In all of the public land grants, made in aid of the construction of railroads, the grant was limited to *public lands not mineral*, but it was only in the case of what are known as the transcontinental railroads that it was provided in the granting acts that the word "mineral" should not be held to include iron or coal.

In all the land grants in aid of the construction of railroads the grant attached upon the definite location of the road, and in all of them providing for indemnity, the indemnity provision was, as a consequence, limited to settlement claims and disposals occurring *prior* to the definite location of the road.

To a proper understanding of the situation the attention of the court should be called to the fact that in the early decisions of the Land Department, in

construing the several railroad land grants it was *first* held that rights thereunder attached by the survey of the line of road in the field; *later,* by the adoption of a definite line of road by the board of directors, and *finally,* by the filing with the Land Department of a map showing the approved or definitely located line of the projected road.

Notice of the projected road naturally invited settlement, indeed that was the purpose of the grant in aid of the railroad construction, and it sometimes occurred that settlers were brought within the limits of a railroad grant after rights were held by the Land Department to have attached under the grant, and this without previous notice to the settlers through withdrawal, and thus a class of meritorious claimants were at the mercy of the railroad company under its grant as the initiation of their claim was at a date subsequent to the time at which, by the decision of the Land Office, the right of the railroad company was declared to have attached to the land settled upon. It was this condition that called for the passage of the act of June 22, 1874, and as this act is not very long and on its construction depends the solution of this case, we quote the entire act:

> "That in the adjustment of all railroad land-grants, whether made directly to any railroad company or to any state for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the preemption or homestead laws of the United States, subsequent to the time at which, by the decision of the land office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for,

> shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: Provided, that nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to any such railroad or to extend to lands reserved in any land-grant made for railroad purposes."

To summarize this statement, we find that the original granting act of July 27, 1866, *supra,* granted the public lands not mineral within the place or primary limits to which

> "the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd-numbers not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers:"

with a provision "that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal." Thus, under the granting act of 1866, the com-

pany took title to the odd-sections in place and to the odd-sections selected within the secondary or indemnity belt in lieu of settlements or other disposals occurring *prior* to the definite location of the road irrespective of any question as to whether the lands possessed iron or coal deposits, and without regard to the possible value of such deposits.

As the act carried title to all lands to which the United States had full title at the date of definite location of the road not occupied or claimed adversely to the grant, there was no provision for the protection of those going on the lands *after* the definite location of the road. Because of the vacillating holdings of the Land Department with respect to the date when rights attached under the several railroad land grants, and the further fact that until survey was made it was practically impossible for a settler or other claimant to determine whether he was upon an odd-numbered section granted or an even-numbered section remaining to the United States, *amendment* of the several land grants so as to deal with this situation was absolutely necessary or a deserving class of claimants must lose out because of superior rights under the railroad land grants. The act of 1874 met this situation, and the real question in this case is whether, IN DETERMINING RIGHTS UNDER THE ACT OF JUNE 22, 1874, SAID ACT IS TO BE CONSTRUED AS IN *PARI MATERIA* WITH THE PARTICULAR GRANTING ACT UNDER WHICH RIGHTS ARE RELINQUISHED ON REQUEST OF THE SECRETARY OF THE INTERIOR?

FACTS SHOWN BY THE RECORD WITH RESPECT TO THE PARTICULAR SELECTION HERE INVOLVED.

The tract made the base for the selection here in question was settled upon after rights had attached under the grant of 1866, and upon the request of the Secretary of the Interior was duly relinquished in order to protect the settlement claim, the relinquishment accepted May 25, 1917, and the settlement claim has since been passed to patent. A *status quo* cannot therefore be restored.

With regard to the tract selected in lieu, being the particular tract here involved, a part of the land was, February 18, 1918, priced as coal land at $133.00 per acre, and the remainder was priced at $135.00 per acre, both reckoned upon the supposed coal deposits in the land. It is true that this pricing of the land occurred prior to the filing of the selection in question, December 1, 1921, but it also occurred prior to the passage of what is known as the leasing act February 25, 1920 (41 Stat. 437).

THE PRESENT CASE IS NOT AFFECTED BY WHAT IS KNOWN AS THE LEASING ACT OF FEBRUARY 25, 1920.

The case is further sought to be complicated by reason of what is commonly known as the leasing act of February 25, 1920 (*supra*). But in our opinion this act in nowise affects the company's right under its selection here involved.

In the recent case of Santa Fe Pacific Railroad Company v. John Barton Payne, Secretary of the Interior, 259 U. S. 197, involving a somewhat similar

selection under the act of April 28, 1904 (33 Stat. 556), this court held that the moment that lands were relinquished at the request of the Secretary of the Interior a contract was made and the Government was bound to convey to the company a selection later made, provided, only, that the lands were subject to selection under the act.

In the decision of the Secretary of the Interior, copy of which is attached to the bill (Record, p. 5), the Secretary finds that the company has filed affidavits showing the lands selected to be non-mineral other than coal or iron, and that the Geological Survey, in its reports on the case, has corroborated this fact. He states, therefore, that

> "Except for the coal character of the selected land, there appears no reason why the selection should not be allowed."

If, therefore, coal is not included within the word "mineral" as used in the act of June 22, 1874, under which the selection is filed, the value of the coal deposits can in nowise affect the company's right of selection.

In order that the court may understand about the pricing of these coal deposits, permit us to say that as early as 1906, the officers charged with the administration of the public land laws reached the conclusion that the denominated prices for coal lands as fixed in Sec. 2347 of the Revised Statutes should no longer be followed. By said section provision was made for the disposal of public lands containing coal deposits in quantities of 160 acres to an individual, and 320 acres to an association upon payment of $10.00 and $20.00

per acre, reckoned upon the distance from a completed railroad. The statute in this particular reads:

> "Upon payment to the receiver of not less than $10.00 per acre for such lands where the same shall be situated more than fifteen miles from any completed railroad, and not less than $20.00 per acre for such lands as shall be within fifteen miles of such road."

The administrative officers, because the statute provides for payment "of not less than" $10.00 and $20.00, reckoned upon distance from a completed railroad held that the department was invested with power to fix a higher price based upon investigations respecting the value of the coal deposits, and it was under this supposed power that the prices of $133.00 and $135.00 were fixed with respect to the selected land here in question in the year 1918.

Now with respect to the leasing act, that act merely changed the *manner* of disposal of public lands containing coal, phosphate, oil, oil shale, gas and sodium, by providing for a leasehold interest rather than a fee simple title. With respect to this manner of disposal the act provided, on proper application, for a permit to be followed on the disclosure of the deposit with the granting of a lease on a royalty basis. With respect to the land in question, no permit, license or other act had invoked the provisions of the leasing act prior to the filing of the selection here in question. In this regard the court below, in its opinion, said:

> "The plaintiff company is confronted by still another difficulty. The selection in question was not made until December 1, 1921. It was, there-

fore, preceded by the act of February 25, 1920 (41 Stat., 437), which withdrew the coal lands of the United States from sale and provided that they could only be disposed of by lease. Certain lands were excepted from the provisions of the act, but the land here in question is not affected thereby. *This particular land had been withdrawn under the act of 1920,* and was not, therefore, subject to selection in December, 1921."

It is assumed that the court below had in mind sec. 37 of the leasing act which is the section relied upon in the opinion of the Secretary of the Interior. That section reads:

"Sec. 37. That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled 'Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal mining operations on certain lands in Wyoming,' approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this act, except as to valid claims existent at date of passage of this act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

It must be remembered that the right of selection in lieu of the land relinquished is by the act of June 22, 1874, limited to lands within the limits of the company's grant, and the court's construction if followed to its logical conclusion, would result in not only defeating the right of lieu selection under the act of June 22, 1874, but also the right of indemnity selec-

tion provided for in the original grant of 1866 not exercised at the date of passage of the leasing act. In other words, it would destroy specific rights granted the company long ago earned by construction of the road and relinquishment on request of the Secretary of the Interior.

In this connection, attention is called to the fact that the leasing act specifically recognizes and indicates a purpose *not* to interfere with claims under railroad grants for, by Sec. 20 of the act, it is provided:

> "Sec. 20. In the case of lands bona fide entered as agricultural and not withdrawn or classified as mineral at the time of entry, but not including lands claimed under any railroad grant, the entryman or patentee, or assigns, where assignment was made prior to January 1, 1918, if the entry has been patented with the mineral right reserved, shall be entitled to a preference right to a permit and to a lease, as herein provided, in case of discovery; and within an area not greater than a township such entryman and patentees or assigns holding restricted patents may combine their holdings, not to exceed two thousand five hundred and sixty acres, for the purpose of making joint application. Leases executed under this section and embracing only lands so entered shall provide for the payment of a royalty of not less than 12½ per centum as to such areas within the permit as may not be included within the discovery lease to which the permittee is entitled under section 14 hereof."

The evident purpose of section 37 of the leasing act, above quoted, was merely to terminate the power of *purchase of coal lands* under Sec. 2347 of the Revised Statutes, except in those instances where a right of purchase has been acquired under existing laws by

the opening of a coal mine, and thereby might be held to have withdrawn coal lands from the right of coal land purchase. If, however, coal is not a mineral within the meaning of the exception of mineral lands found in the act of June 22, 1874, when applied to a selection in lieu of a tract earned under the act of July 27, 1866, and relinquished, then the *general* legislation found in the leasing act can have full application without reference to lands within the limits of a railroad land-grant lawfully claimed thereunder, and should not affect the exercise of such lawful right.

This brings us, therefore, to a consideration of what has heretofore been stated to be the real question involved in this case, namely, whether,

IN DETERMINING WHAT IS MEANT BY "PUBLIC LANDS NOT MINERAL," AS USED IN THE ACT OF JUNE 22, 1874, SAID ACT MUST BE CONSIDERED AS IN *PARI MATERIA* WITH THE GRANTING ACT, AND WHEN SO CONSIDERED, THE LANDS ARE CONSIDERED AS NON-MINERAL NOTWITHSTANDING THE PRESENCE OF VALUABLE DEPOSITS OF COAL.

Let us first look to the portions of the opinions below bearing on this question. When this case was argued in the Supreme Court of the District of Columbia, at the conclusion of the argument, the court stated that it was clearly of the opinion that the company's contention, that the two acts, June 22, 1874 and July 27, 1866, must be construed as in *pari materia,* is correct, and in the given case, where the original granting act excluded from the word "min-

eral'' coal and iron lands, that in determining rights under a selection made under the act of June 22, 1874, the word ''mineral'' as there employed should be likewise circumscribed. However, later, in a memorandum opinion, page 11 of the record, the court said:

> ''It seems to me on a further examination of the act of June 22, 1874 (18 Stat. 194), that whatever Congress meant by the words 'to which they shall receive title the same as though originally granted,' it was not intended to limit the meaning that would ordinarily be conveyed by use of the words 'not mineral.' Had Congress intended otherwise, it would have done as it did in the Act making the grant to the railroad—that is to say, would have provided that the word 'mineral' should not be held to include iron or coal.''

The Court of Appeals seems to have entertained the same view although differently expressed. In its opinion, pages 17, 18, the court says:

> ''It is the contention of plaintiff company that inasmuch as the act of 1866 excepted from its mineral provisions iron or coal, that the act of 1874, permitting the selection of lieu lands not mineral, is likewise to be interpreted as exempting from its mineral provisions iron or coal. We think this contention can not be sustained, and that so far as the mineral limitation is concerned, the act of 1874 must be construed without reference to the original granting act. It deals with a situation not contemplated by or embraced within the provisions of the original act. No involuntary condition was forced upon the railway company. It merely provided that in the event of settlement on the railway lands, the railway company might relinquish to the Government in favor

of the settler, and select in lieu of the lands relinquished, lands equal in *quantity and value.*"

Looking, first, to the decision of the Supreme Court of the District, it must be very apparent that had the act of 1874 provided, as suggested by the court, it would have resulted in *enlarging* all the grants in aid of the construction of railroads, excepting the few transcontinental lines, which in their original grants contained a provision that the word "mineral" should not be held to include iron or coal. This was never the intention of Congress, for, so far as expressed, it seems that it was the intention of Congress in passing the act of 1874 neither to enlarge nor diminish the lieu or indemnity right given reckoned on the provisions of the original grant.

Looking now to the portion of the decision of the Court of Appeals, above quoted, we note that there is nothing in the act of 1874 limiting the selection of lands in lieu of those relinquished to other "lands equal in quantity *and value.*" In this connection, it must be remembered, that Congress undoubtedly had a defined policy in permitting the large transcontinental railroads to take under their grants lands containing iron or coal products. These railroads were great undertakings opening up country practically unexplored, and coal and iron were necessary products not only in construction, but in later maintenance of the proposed railways. Nothing had occurred to change this policy, and the construction of the act of '74 should be in line with the constructive policy so clearly defined in the original granting acts, and surely the generosity of the companies in relinquishing that which belonged to them in order to

protect unfortunates misled, furnishes no reason for changing this policy or penalizing the companies because of their generosity.

The act of 1874 provided that the grantee company should receive title to the lieu selection as though originally granted. In other words, the lieu lands were to be taken in place of those surrendered, as the surrendered lands might have been taken under original grant. This left both the companies and the individual as though the provision protecting those coming after definite location had been incorporated in the original grant. Nothing could be fairer, and if this were the purpose of Congress it could not have been more clearly expressed.

DOES THE GRANTING ACT OF 1866 PERMIT SELECTION WITHIN THE ENLARGED OR INDEMNITY BELT OF LANDS CONTAINING VALUABLE DEPOSITS OF COAL WHERE THE SAME IS TAKEN IN LIEU OF AGRICULTURAL LANDS LOST WITHIN THE PRIMARY OR PLACE LIMITS OF THE GRANTS?

We have before quoted from section 3, or the granting section of the act of July 27, 1866, providing for indemnity. To repeat, that section provides where any of the granted sections "shall have been granted, sold, reserved, occupied by homestead settlers, or preempted or otherwise disposed of, other lands shall be selected by said company in lieu thereof under the direction of the Secretary of the Interior," etc. These lieu or indemnity lands are as much granted as are the lands in place. True they do not become specifi-

cally identified until formally selected. In the court below however it was said by the appellee that the department "has permitted" the railroads to select indemnity lands containing coal and iron in lieu of lands lost in place on account of settlement, etc. But we say that there is not now and never has been any question of the company's right to select coal and iron lands as indemnity for lands lost by reason of settlers' claims existing prior to date of definite location, and any possible question of this right rests upon a lack of appreciation of that provision in the original act of 1866, that the word "mineral" shall not include coal and iron lands. The right to take coal or iron lands as indemnity for a disposal by reason of a settlement claim existing prior to the definite location of the road being clear, did the Congress, when requesting the company to relinquish lands fully earned, intend to limit the lieu or indemnity right then granted beyond that provided for in the original granting act?

For illustration let us assume that the right of the road under the original grant attached January 1, 1875. A settlement made on December 31, 1874, was by exceptions in the grant protected and the company relegated to its indemnity right on account thereof. In that event the company, under its grant, could have taken lieu lands notwithstanding the presence of coal and iron deposits and, indeed, without regard to the value of such deposits. Where, however, the settlement was made on January 2, 1875, the company's right under its original grant was unaffected by such settlement, and the act of 1874, as above stated, was passed in order to protect the later settler through a relinquishment filed upon the request of the Secretary of the Interior, whereupon the company was to take

other lands, but still within the limits of its grant "to which it was to receive title the same as though originally granted." As here used, this expression meant nothing more than that the company, on relinquishment in favor of the January settler, was to be placed in no worse position than it would have been in taking indemnity on account of the December 31 settler who had the superior right. In the decision of the court below, in considering the above quoted part of the act of 1874, the court says:

> "Counsel for appellant company lay stress upon the clause of the Act of 1874 which provides that as to lieu lands selected and approved, the railroad company 'shall receive title the same as though originally granted.' This refers merely to the kind of title and the avenue through which it shall pass, and does not relate to the quality of land to be selected, or invest the railroad company with any right of selection equivalent to that provided in the original grant. They were words of conveyance, not of power."

With all due respect to the court below, permit us to say that the court confuses *form* with *substance,* looking alone to the *evidence* to be given of the title rather than the plain intention as stated, to pass title to the lieu or selected lands as though the same had been provided for in the original granting act.

In full recognition of the position here contended for, we call attention to the fact that where Congress intended otherwise, that is, where it intended that the word "mineral" shall not have the same meaning as that provided for in the original granting act, it, in the later legislation, clearly expressed itself. Thus, by the act of July 2, 1864 (13 Stats., 365) making the

grant in aid of the Northern Pacific Railroad, a transcontinental line, it was provided that the word "mineral" should not include iron or coal. But by the act of July 1, 1898 (30 Stats. 597, 620), providing for adjustment of disputes between the Northern Pacific Company and individual claimants, it was provided that the company might relinquish in favor of the individual claimant; whereupon a lieu right of selection was granted, *not restricted like in the case here under consideration, to the limits of the company's grant, but included public lands surveyed or unsurveyed, within any state or territory, into which the Northern Pacific extends,* and the Congress, not intending that the word "mineral" should be applied as in the original granting act, specifically provided *against* the right to select lands containing iron or coal.

It may not be inappropriate also to call attention to the fact that the Land Department has applied the principle, namely, of considering the several grants in relation to the same subject-matter as in *pari materia* when considering a selection made under this same act of June 22, 1874, for in the case of *Power* v. *Olson, et al.* (25 L. D. 77-80) it was said:

> "It is clear from this language that when a lawful selection is made under said act by a railroad company of other sections than those specified in the granting act to said company, lands, so selected, become, from the date of selection, and are in legal effect, the numbered sections of such grant, irrespective of whether they be situated in the numbered sections specified in the original granting act or not, the same as though they had been originally granted."

Indeed, in this case, the department went even further and not only construed the act of 1874 as in *pari*

materia with the granting act (in that case the Northern Pacific granting act) but also the act of March 3, 1887, another general act, applying to lands in railroad land grants. In the course of the opinion the Department said:

> "The act of June 22, 1874, and the act of March 3, 1887 both relate to the adjustment of all railroad grants, and they should be construed in *pari materia* under familiar rules of statutory construction. * * *
>
> Construing the act of 1874, Sec. 5 of the act of 1887, and the granting act to the Northern Pacific Company altogether as being in *pari materia,* I conclude that Power's application to purchase clearly comes within the remedial provisions of the fifth chapter of the act of 1887."

This is a clear recognition of the principle herein urged in support of the selection in question.

THE SECRETARY'S ACTION IN REFUSAL TO APPROVE THE COMPANY'S SELECTION IS ARBITRARY, IN THAT HE EXCEEDED HIS POWER AND AUTHORITY IN TAKING INTO CONSIDERATION IN DETERMINING ITS VALIDITY THE FACTS WITH RESPECT TO THE POSSIBLE COAL CONTENTS AND THE VALUATION OF THE LANDS IN THAT REGARD.

It will be remembered that the selection was found to be in all respects regular and valid, but for the valuation with regard to possible coal values.

If we are right in the contentions hereinbefore advanced: (a) that under a proper interpretation of the

act of 1874 lands are non-mineral, so far as the Santa Fe Pacific grant is concerned, notwithstanding the presence of valuable deposits of iron or coal, and (b) that a mere valuation of the lands with respect to such deposits does not in and of itself withdraw the lands from the company's right of selection, then the action of the Secretary in denying approval to the selection merely because of such coal valuation is as arbitrary as though he had withheld approval on personal grounds.

In Santa Fe Pacific Railway Company v. Payne, Secretary, etc., *supra*, in considering a somewhat similar question, the Supreme Court said:

> "The Government argues that there was no jurisdiction over the bills because the question whether the lands selected were of the same quality as those relinquished, rested wholly in the judgment of the Secretary. But the position of the Railroad Company is that the Secretary went beyond the powers conferred upon him by the statute when he took into account facts not known at the time of the selection, and we are of opinion that the Company is entitled to bring that question into court."

Has the Company not the same right to bring into court the questions herein presented?

It is our contention that the company has fully entitled itself to patent and that the action of the Secretary is in cloud of the company's title.

The company's title to the lands in place made the base for the selection in question has been accepted and passed to another, and as said by this Court, the Government is bound to convey a proper selection made in exchange.

In this regard, we again notice that part of the memorandum opinion of the court below wherein the court says:

> "The land selected by the railroad company might before selection have been withdrawn by the Executive so as not to be available for selection or occupation for any private purpose. It follows as was held by the Secretary, that where the land was by Executive order withdrawn before selection and later restored to be occupied only on terms inconsistent with the claimed right its right no longer exists."

The withdrawal of these with other lands for classification was only a withdrawal from coal entry. (R. p. 6.)

After valuation regarding coal contents, the lands were restored even to coal entry, other prices being substituted for the $10.00 and $20.00 classification as made in the coal land act. (Rev. Stat. Sec. 2347.)

There is clearly no authority for the court's statement:

> "It follows as was held by the Secretary that where the land was by Executive order withdrawn before selection and later restored to be occupied only on terms inconsistent with the claimed right its right no longer exists."

We ask, therefore, that the decision of the Court of Appeals be reversed, and the case remanded with directions to grant the prayers of the plaintiff's bill.

ALEX. BRITTON,
F. W. CLEMENTS,
Attorneys, Santa Fe Pacific Railway Company.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 302.

SANTA FE PACIFIC RAILROAD COMPANY, *Appellant.*

vs.

HUBERT WORK, SECRETARY OF THE INTERIOR, *Appellee.*

SUPPLEMENTAL BRIEF OF APPELLANT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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SUPPLEMENTAL BRIEF OF APPELLANT.

In quoting the act of June 22, 1874 (18 Stats. 194), the statute under consideration, due to some possible oversight in proofreading or otherwise, the second proviso to the act was omitted and to meet this oversight we now quote the act in full.

> "Be it enacted by the Senate and House of representatives of the United States of America in Congress asembled, That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose

entry or filing has been allowed under the pre-emption or homestead laws of the United States subsequent to the time at which, by the decision of the land-office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands, so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: Provided, That nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to any such railroad or to extend to lands reserved in any land grant made for railroad purposes: And provided further, That this act shall not be construed so as in any maner to confirm or legalize any decision or ruling of the Interior Department under which lands have been certified to any railroad company when such lands have been entered by a pre-emption or homestead settler after the location of the line of the road and prior to the notice to the local land-office of the withdrawal of such lands from market."

In this connection, in appellee's brief, reference is made to a part of the legislative history of this act, and in order that the court may be fully informed, we give a more detailed and complete history of the legislation as far as available.

This legislation was recommended by the Commissioner of the General Land Office in his letter of March 13, 1874, addressed to Hon. Wm. Wyndom,

U. S. Senate. We here quote his letter in full, together with a draft of the legislation as proposed by him:

March 13, 1874.

Hon. Wm. Wyndom,
U. S. Senate.

Sir:

Referring to the communication filed by you from J. C. Braden, Esq., Litchfield, Minn. and which is herewith returned, relative to the claims of certain settlers whose entries and filings were held for cancellation by this office 28th Jan. 1873, for conflict with the grant to the St. Paul & Pacific R. R. Co.

I have the honor to state that these entries and filings, with a great many others, falling in the different land districts, along the Main line and St. Vincent Extension of the St. Paul & Pacific Railroad, were based upon settlement made prior to the survey of the lands, but subsequent to the definite location of the road, when the right of the company attached under their grant.

This Office had therefore no alternative when the cases were reached in the regular order of business, but to hold them for cancellation.

It is beyond doubt, as stated by Mr. Braden, a great hardship to these settlers to be thus deprived of the labor of years, through no fault of their own, as neither they nor the district land officers were aware at the date of settlement and entry, that the right of the Company had already attached to the lands, and if possible, it is very desirable that some Congressional legislation be enacted for their relief.

In view of the statement made in the letter of Hermann Trott, Esq., Land Commissioner of said company, attached to Mr. Braden's letter, to the effect that said Company would probably, if called

upon, relinquish their claim to the lands, if their rights were not prejudiced thereby. I would suggest that as there is no authority of law to legalize such entries, even in case of a relinquishment by the Company, except by submission to a board of confirmation, an act of Congress authorizing such relinquishment, and legalizing the entries might be passed.

It should however be of a general character applying to all such cases within the limits of any Railroad grant, and as an inducement to the Companies to so relinquish, the right to select other lands in lieu of those surrendered should be secured to the said companies.

The selections might be allowed from the alternate Government sections within the limits of the grant, not otherwise appropriated at date of selection.

I enclose herewith draft of a Bill for your consideration, which it is thought will if passed accomplish the object desired.

Very Respectfully,
WILLIS DRUMMOND,
Commissioner.

A Bill for the relief of settlers on Railroad Lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

That whenever in the adjustment of a Railroad grant any of the lands granted shall be found in the possession of an actual settler, whose entry or filing has been allowed under the pre-emption or homestead laws of the United States, the grantees upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other

lands in lieu thereof, from any of the public lands within the limits of the grant, not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. Any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted.

It will be noted that in the draft submitted by the Commissioner, in lieu of the land relinquished, the grantee company "shall be entitled to select an equal quantity of other land in lieu thereof, from any of the public lands within the limits of the grant, not otherwise approved at the date of selection, to which they shall receive title the same as though originally granted."

As recommended the bill was passed by the House with the addition of the following:

> "But nothing herein contained is in any manner to be construed as to enlarge the grant to any such railroad; and this act is not to be construed so as in any manner to confirm or legalize any decision or ruling of the Interior Department under which lands have been certified to any railroad company when such lands have been entered by a pre-emption or homestead settler after the location of the line of the road and prior to the notice to the local land office of the withdrawal of such lands from market."

Now it will be noticed that as recommended by the Commissioner of the General Land Office, and as the bill was passed by the House, there was no reference to *mineral lands,* in providing for the selection of lieu lands, and it must have been understood that the lieu lands were to be taken on the same terms as provided for *other lieu lands* in each of the granting acts, ex-

cept that the class of lands subject to selection included "the alternate government sections within the limits of the grant."

The Commissioner in his letter recommending the legislation had plainly called the attention of Congress to the fact that an *inducement* must be offered the companies to secure relinquishment in favor of the meritorious class mentioned, and the intention was clearly to *extend* and not *limit or reduce the lieu right provided in the original grant.* As before stated, both the Commissioner and the House of Representatives must have been of opinion that the conditions of the original granting act regarding mineral lands prevailed and this could only be because of the provision that the grantees were to receive the title to these lieu lands "the same as though originally granted."

In this connection, we call further attention to the fact that the amendment by the House was what might be called an attempted legislative construction of the granting acts, or an attempt to read into the granting acts an exception of lands included in homestead and pre-emption entries made after the date of definite location of the railroad, but before notice of the withdrawal thereunder was received at the local land office. The House was therefore seeking to make the protection possible under the *original act* and could therefore have had no possible reason to limit the ordinary indemnity right as therein provided for.

Looking further to the legislative history, we find that when the bill reached the Senate it was taken up under unanimous consent and the following occurred:

Mr. Hager: "I have some amendments to offer which are not objected to by the committee."

Mr. Edmunds: "Let the bill be considered subject to objection, for if we are to have new matter inserted, we must reserve the right to object."

The President Pro tempore: "The bill will be considered subject to objection."

Mr. Hager: "My first amendment is to insert after the words 'lands in line 13' the words 'not mineral.' "

Mr. Wyndom: "There is no objection to that. The amendment was agreed to."

This clearly indicates that the insertion of the words "not mineral" was not considered as new matter, that is, it must have been considered that those words were merely inserted out of abundant caution and carried no more than would have carried by the bill had the words been omitted, for no explanation was even called for.

We have examined the Congressional Record relating to the 43rd Congress and have inquired at the document room at the Capitol and are unable to find that any written report was ever made by either the House or Senate on the bill resulting in the legislation under consideration.

Nearly two years later the Congress passed the act of April 21, 1876 (19 Stats. 35) intended to protect like settlers within railroad limits without any provision for indemnifying the railroad grantee. This act provided:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands,

made in good faith, by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land-grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land-office of the district in which such lands are situated, or after their restoration to market by order of the General Land-Office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto. Sec. 2. That when at the time of such withdrawal as aforesaid valid pre-emption or homestead claims existed upon any lands within the limits of any such grants which afterward were abandoned and, under the decisions and rulings of the Land Department, were re-entered by pre-emption or homestead claimants who have complied with the laws governing pre-emption or homestead entries, and shall make the proper proofs required under such laws, such entries shall be deemed valid, and patents shall issue therefor to the person entitled thereto. Sec. 3. That all such pre-emption and homestead entries which may have been made by permission of the Land Department, or in pursuance of the rules and instructions thereof, within the limits of any land-grant at a time subsequent to expiration of such grant, shall be deemed valid, and a compliance with the laws and the making of the proof required shall entitle the holder of such claim to a patent therefor."

The legislation of June 22, 1874, and April 21, 1876, was prior to the decision of this court in the case of Van Wyck v. Knevals, 106 U. S. 330, October term, 1882, wherein, considering the grant made by the act

of July 23, 1866, for the benefit of the St. Joseph & Denver City Railroad Company, it was held:

> "That the grant was *in praesenti* and attached to those sections (meaning the granted sections) as soon as the map was so filed. No valid adverse right or title to any part of them could be acquired by a subsequent settlement or entry." Syllabus.

To invoke the act of June 22, 1874, *supra*, it was necessary that the settler should have been allowed to make entry of the land. By the act of August 29, 1890, 26 stats., 369, it was provided:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the privileges granted by the aforesaid act approved June twenty-second, eighteen hundred and seventy-four, are hereby extended (subject to the provisos, limitations, and restrictions thereof) to all persons entitled to the right of homestead or pre-emption under the laws of the United States, who have resided upon and improved for five years lands granted to any railroad company, but whose entries or filings have not for any cause been admitted to record."

It should be clearly understood that the appellant company is not seeking *mineral lands*. Its granting act excepted *mineral lands*, but the word "mineral," it was provided, should not include coal and iron. This meant nothing less than that lands containing coal deposits, no matter how valuable, were not to be construed as *mineral lands*, and therefore within the exception of such lands from the operation of the grant.

ALEXANDER BRITTON,
F. W. CLEMENTS,
Attorneys for Appellant.

In the Supreme Court of the United States

OCTOBER TERM, 1924

SANTA FE PACIFIC RAILROAD COMPANY, appellant
v.
HUBERT WORK, SECRETARY OF THE INTERIOR

No. 302

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

STATEMENT

This suit, initiated in the Supreme Court of the District of Columbia, is for an injunction to restrain the Secretary of the Interior from cancelling a selection made by the Santa Fe Pacific Railroad Company of a certain tract of 40 acres in the State of New Mexico, and from any other action with respect to this tract except the issuance of patent therefor to the company.

The bill of complaint discloses the following situation (R. 1–4):

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The railroad company is the successor of the Atlantic & Pacific Railroad Company to which Congress by the Act of July 27, 1866, c. 278, 14 Stat. 292, granted lands in aid of construction of a railroad. The grant was of alternate sections of public lands not mineral, or reserved, sold, granted, or otherwise appropriated, designated by odd numbers to the amount of twenty alternate sections per mile on each side of the road as definitely located through the territories and ten alternate sections through any state (Sec. 3). The word *mineral* in the Act was not to be held to include iron or coal.

By the Act of June 22, 1874, c. 400, 18 Stat. 194 (U. S. Comp. St. 1916, sec. 4889), entitled "An Act for the relief of settlers on railroad lands," it was provided:

> That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the preemption or homestead laws of the United States subsequent to the time at which, by the decision of the land office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise

> appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: *Provided,* That nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to any such railroad or to extend to lands reserved in any land grant made for railroad purposes.

The Act of August 29, 1890, c. 819, 26 Stat. 369 (U. S. Comp. St. 1916, sec. 4890), extended the provisions of this Act to homestead and preemption claims, after residence and improvement for five years, which had not been admitted to record.

Pursuant to this Act the railroad company, on December 1, 1921, filed in the proper local land office an application to select the 40-acre tract in controversy in lieu of a tract of the same area which it had relinquished because of a settlement claim coming within the terms of the Act of June 22, 1874. This filing was accepted by the local land office, but was rejected by the Secretary of the Interior for the reason that the land applied for was embraced in a coal withdrawal, and being coal in character the Act of June 22, 1874, did not authorize its selection or permit the patenting of it; and for the further reason that prior to the filing of the selection Congress had by the Act of February 25, 1920, c. 85, 41 Stat. 437, provided that deposits of

coal should be disposed of by lease only. (Ex. A, R. 5–10.)

The theory of the bill appears to be that, inasmuch as the granting act of 1866 declared that "mineral" should not include coal or iron, the same construction should be given the word in the Act of June 22, 1874, in so far as selections made by appellant are concerned (R. 4).

A motion to dismiss the bill of complaint was interposed by the Secretary, the grounds of which were: (1) Want of equity; (2) that the disposition of public lands of the United States is committed to the Secretary and not to the courts; and (3) that the Secretary in the exercise of the jurisdiction vested in him had determined that under the law the land was not subject to selection because mineral within the terms of the applicable statute, and that his action and construction of the statute were not reviewable by the courts (R. 11). This motion was sustained and the bill dismissed (R. 12); Memo. of Opinion (R. 11–12).

An appeal to the Court of Appeals of the District of Columbia resulted in an affirmance (R. 20). Opinion (R. 17–20), 295 Fed. 982. A further appeal brings the case to this court.

ARGUMENT

I

The jurisdiction of this court

Appellant rests its right to an appeal upon the fifth and sixth paragraphs of section 250 of the Ju-

dicial Code. Those paragraphs provide for a review—

> *Fifth.* In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.
>
> *Sixth.* In cases in which the construction of any law of the United States is drawn in question by the defendant.

It is asserted that the case comes under the fifth paragraph " in that the scope of the power of the Secretary of the Interior over the selection in question as well as the duty of that officer with respect to such selection is directly drawn in question in these proceedings." (Petition for appeal, R. 20.)

We think it clear that the case does not present a question of the scope of the power or duty of the Secretary. There can be no dispute that the Secretary had power to hear and determine the right of appellant to the tract involved. Appellant conceded, by its application to select, the *power* of the Secretary in this regard. Having the power to decide, he had the power to render such decision as he deemed right. Like the jurisdiction of a court, the Secretary's power does not depend upon a correct decision. *Fauntleroy* v. *Lum,* 210 U. S. 230, 235; *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 306, 307. A challenge of the correctness of his decision is not a drawing in question of the scope of his power.

Again, the filing of the selection application not only provoked the exertion of the *power* of the

Secretary but also made it his *duty* to determine whether it should be approved. The performance of that duty involved the construction of the applicable law. When he construed the law and rendered his decision the Secretary discharged his duty. Had he asserted that the scope of his duty did not extend to this selection or require action thereon, then this case would be squarely within the terms of the fifth paragraph of Section 250. But the complaint of appellant is not that the duty was not performed but that the result was not to its liking. This, however, did not draw in question the scope of the duty of the Secretary.

The case comes well within the purview of the holdings in *Champion Lbr. Co.* v. *Fisher,* 227 U. S. 445; *Taylor* v. *Taft,* 203 U. S. 461.

To bring the case within the sixth paragraph of section 250 appellant avers (R. 21)—

> that the construction of the Act of June 22, 1874 (18 Stat. 194) is brought in question by the defendant who asserts and relies upon that Act for denial of approval to the selection of the land involved because of supposed coal value in the land.

There is no basis for the assertion that the construction of any law was drawn in question by the Secretary of the Interior, defendant below. The appellant here, plaintiff below, was the party which drew in question the construction of the Act of June 22, 1874. It based its case upon that and the bill of complaint proceeded on the theory that the

construction given the statute by the Secretary was erroneous.

The motion to dismiss disclosed that the Secretary was well satisfied with his construction of the Act. He did not ask the court to construe the Act; on the contrary, the burden of the entire motion is that the court was without jurisdiction to review his construction or action. To say that he drew in question the construction of the law would be to contradict the terms and tenor of the whole pleading.

We therefore submit that the appeal should be dismissed for want of jurisdiction. *United States ex rel. Sykes* v. *Payne,* 254 U. S. 618.

II

The decision of the Secretary was made in the exercise of judgment and discretion and hence is not properly subject to review by the courts

The question presented to the Secretary of the Interior by appellant's application was whether the land selected could properly be approved and patented to the railroad company. To determine that question, it was necessary to construe primarily the Act of June 22, 1874, under which the selection was made, and also the Leasing Act of February 25, 1920. The Secretary construed the first act as not authorizing the selection of coal land, interpreting the word " mineral " as including such land. He also construed the Leasing Act

as prohibiting any disposition of coal lands except as provided in that Act.

The case presented, therefore, is one where the Secretary in the exercise of his undoubted jurisdiction was called upon to administer the law. This required the exercise of judgment and discretion in the interpretation of the appropriate statutes. The rule is well settled that neither an injunction nor mandamus will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion. *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 324. The Secretary could not administer or apply the law without construing it, and that involved the exercise of judgment and discretion. *Hall* v. *Payne,* 254 U. S. 343, 347.

The question is not whether the decision of the Secretary was right or wrong but whether his decision, made in the discharge of a duty imposed by law and involving the exercise of judgment and discretion, may be reviewed and he be compelled to retract it and give effect to one not his own. That question, often considered by this court, has been uniformly answered in the negative. *Ness* v. *Fisher,* 223 U. S. 683, 692.

Where there is discretion, even though its conclusion be disputable, it is impregnable to mandamus. *Alaska Smokeless Coal Co.* v. *Lane,* 250 U. S. 549, 555. There is no difference in the application of these principles between cases in mandamus and cases for injunction. Of course were the Secre-

tary's construction plainly erroneous and his action clearly arbitrary, the court would be justified in reviewing his action. But that is not the situation here, for the two courts below have held his action and judgment proper and correct. It is therefore exceedingly difficult to see any basis for a contention that the Secretary acted arbitrarily or that his construction was patently erroneous.

III

The decision of the Secretary was correct

In brief, and limiting it to the railroad company here involved, the Act of June 22, 1874, provided that if the railroad would relinquish, in favor of a settler coming within the purview of the Act, land to which the right of the company had attached, it could select in lieu of the relinquished land an equal quantity of other land " nonmineral " and " not otherwise appropriated at the date of the selection."

It is apparent that this Act was passed for the benefit and relief of the settlers and not for the railroad. It was not in aid or fulfillment of the grant made to the company, for it had received the land which had been granted and hence to that extent the obligation of the government had been met. So far as the company was concerned the Act was not necessary; therefore it is clear that the Act was not supplemental to the grant.

There was no obligation upon the company to invoke the Act. While holding out inducements to railroad companies to relinquish lands upon which

entries or filings had been made, it left them at liberty to relinquish or not as they saw fit. *Hubbard* v. *N. P. R. R. Co.*, 14 L. D. 695, 696.

The Act of June 22, 1874, made lands "nonmineral" subject to selection There was no qualification or definition of that term. If it had been the intention of Congress to have used the term or to define it as excepting coal or iron, as was done in the granting act, it would have been easy to have so declared.

The Land Department never considered the term nonmineral in the Act as permitting coal or iron lands to be selected but construed it in its ordinary meaning.

On that point the First Assistant Secretary in his decision in this case, said (R. 9):

> I find that it has been the uniform policy of the General Land Office to confine such selections to lands not known to contain coal, iron, or other minerals, and that other railroad companies have acquiesced therein by furnishing proofs of the noncoal or iron character of the land, This construction, in my opinion, harmonizes and is in full accord with the language, purpose, and effect of the said act of June 22, 1874.

Now appellant after the Act had been in force nearly fifty years departs from the construction long acquiesced in.

In a circular of November 7, 1879, 2 Copp's Public Land Laws (1882), 715, 721, the following rules were promulgated:

1. When the superior right of the company is ascertained, and it is found that the claim of the settler is such that it would be admitted were the railroad claim extinguished, this office will, in all practicable cases, direct the attention of the officers of the company to the fact, and request an explicit answer whether or not the land will be relinquished.

At the same time it will be well for the party interested to seek for himself the relief indicated,, by direct application to the railroad authorities, and thereby aid in securing a speedy and satisfactory adjustment.

2. Relinquishment may be made by a simple waiver of claim where the patent or its equivalent has not been issued in behalf of the company; but where title has passed, a formal conveyance will be required, as in other cases of the surrender of patents.

3. When making relinquishment, the company will be permitted to name the tract selected as indemnity; and in order that conflict with pending applications may be avoided, such relinquishment and selection should be filed with the Register and Receiver, and be noted upon their records, before transmission to this office.

But in case the company desires to relinquish at once in favor of the settler, and trust to future selections for indemnity, such relinquishment may be sent direct to this office, and upon its receipt will be noted on the books, and the claim of the settler will be immediately released from suspension.

4. The selections must be of lands not mineral, within the limits of the grant and withdrawal, free from other claims, and not reserved or otherwise appropriated at date of selection.

5. Where fees have been paid upon the original selections, they will be applied to the indemnity. Where tracts not yet formally selected are relinquished, fees will be charged upon the indemnity selections.

6. The selections will be reported by the Register and Receiver in the same manner as original selections, with a reference to the act by its date and title; and opposite each tract annotation will be made of the tract surrendered, and the name of the settler in whose favor it is relinquished, with the number of his entry or filing.

And in a later circular of September 22, 1902, 31 L. D. 424, it was said (p. 426):

> Selections must be of lands, not mineral, within the limits of the grant, free from other claims and not reserved or otherwise appropriated at date of selection, * * *.

Again, it is fair argument to say that Congress in enacting this legislation never contemplated that the terms of the granting act, in so far as they defined "mineral," would ever be imported into the 1874 act. The reason is that the lands which the railroad was invited to relinquish were lands upon which homestead or preemption filings had been or could be made. Coal lands were not subject to entry or disposition under those laws, acquisition of such

lands being provided for under R. S. secs. 2347–2352, originally the Act of March 3, 1873, c. 279, 17 Stat. 607.

Since such lands could not be acquired by those for whose benefit the Act of 1874 was passed, it could not have been supposed that the railroad company would relinquish such lands because its action would not help the settler and the purpose of the Act would not be effectuated.

As Congress expected that only agricultural lands would be relinquished, a construction of the Act that would allow coal lands to be taken would be to impute to Congress a purpose to permit to be selected lands of much greater value than those relinquished. The instant case illustrates how such a construction would result for the appellant by its selections, only one tract of which is included in suit, in securing for agricultural land relinquished, coal lands appraised at $133 and $135 per acre! And yet counsel for appellant refers to the " generosity " of the company in relinquishing the base land to the settler. It insists, however, that its generosity have exceeding great reward and of a material kind.

A reference to the legislative history of the bill which became the Act of 1874, as detailed in Southern Pacific R. R. Co., 18 L. D. 275, indicates that equal value between relinquished and selected lands was contemplated. In that case, the Secretary states that the bill as originally drafted by

the Commissioner of the General Land Office, and, as subsequently amended, was passed. He then says (p. 280):

> In transmitting the draft of the bill to Senator Windom, the Commissioner, in a letter dated March 13, 1874, said:
>
> "As an inducement to the companies to so relinquish, the right to select other land in lieu of those surrendered should be secured to said companies. The selections might be allowed from the alternate government sections within the limits of the grant, not otherwise appropriated at the date of selection."
>
> In a letter, dated March 23, 1874, to Hon. J. T. Averill, of the House of Representatives, the Commissioner, in speaking of the proposed bill, said:
>
> "After careful study, and from my experience in the examination of this class of claims, I am convinced that the only remedy which can be provided by law is one depending upon, and authorizing the consent of parties to a settlement by which the rights and equities of both parties can be recognized. This may be done by offering an inducement to the railroad companies to relinquish the lands. It seems to me they will, in most cases, gladly avail themselves of an opportunity to secure the good will, and relieve the hardships of actual settlers along their routes, if they can at the same time receive their full compensation in kind for the tracts surrendered, by taking an

> equal amount from the public lands of the government in the same vicinity, and of equal value."

The Secretary then makes this comment (p. 281):

> In view of the clear and comprehensive statement by the Commissioner of the General Land Office as to what lands might be selected by the company as an inducement to the companies to relinquish the lands settled upon, can there be any possible doubt that the clear and expressed purpose of the act was to allow the companies to select an equal quantity of lands "from the alternate government sections within the limits of the grant," in lieu of those surrendered by the companies, "by taking an equal amount from the public lands of the government in the same vicinity and of equal value."

We regard *Northern Pac. Ry. Co.* v. *United States,* 176 Fed. (C. C. A.) 706, as helpful and illuminating here. That case involved a construction of the Act of March 2, 1899, c. 377, 30 Stat. 993, which created the Mount Ranier National park, and by section 3 gave the Northern Pacific Railroad Company authority to select public lands within any state into or through which the railroad ran, equal in quantity to lands within the limits of the Park which had inured to it under its grant and which it might reconvey to the United States. One of the limitations was that the selected lands should be "nonmineral . . . so classified as nonmineral at the time of actual government survey."

The company had selected lands which were then known to be coal lands and patent thereto had issued. In a suit brought to recover the lands the company asserted they had been returned by the survey as nonmineral and therefore rightfully passed to it although known to be coal lands when selected. This contention was rejected, the court saying (p. 708):

> In acts almost innumerable relating to the disposal of the public lands Congress has manifested its consistent and insistent intent that its known mineral lands should be disposed of only in accordance with the provisions of its statutes governing that class of lands.

And—

> The lands authorized by Congress to be taken by the railway company in lieu of lands conveyed by it to the United States must not only have been classified by the government surveyor as nonmineral, but must be nonmineral in fact.

The case was appealed to this court but was dismissed on motion of appellant, 223 U. S. 746.

That case did not present the question here raised but it is important because in the Northern Pacific grant "mineral" did not include iron or coal just as it did not in the grant under which appellant claims; and further because it indicates that the court had no doubt that Congress did not intend that coal lands should be taken under that exchange act, which in many respects is similar to the Act of June 22, 1874.

Now the Act provided not only that the land selected be nonmineral in character but that it be "not otherwise appropriated at the date of selection." By the very terms of the Act, therefore, the availability of the land for selection must be determined as of the date when the application to select is made. Even without this express language the same rule would apply, for it is well settled that under an indemnity or lieu selection no right to a specific tract is acquired until the selection is filed, and the lawfulness of the selection is to be determined as of that time when all the precedent conditions have been complied with. *Payne* v. *New Mexico,* 255 U. S. 367; *Wyoming* v. *United States,* Id. 489.

The word "appropriated" in this Act has from the very first been construed by the Land Department as including "reserved." This is evidenced by the instructions of November 7, 1879, 2 Copp's Public Land Laws, *supra,* par. 4, and those of September 22, 1902, *supra.*

In *Union Pacific Land Company,* 33 L. D. 487, it was held that lands in an abandoned military reservation which by a special Act of Congress had been opened to homestead entry were not unappropriated public lands within the meaning of the Act of June 22, 1874. This decision followed a decision in the case of *State of Utah,* 30 L. D. 301, wherein also a right to select lands in an abandoned military reservation was considered under a statute which allowed selections "from the unappropriated public lands." In the *Utah* case, the Land Department had held that such lands were

appropriated because they were to be disposed of under special Acts of Congress. The Secretary quoted from the opinion in the *Utah* case, the part particularly important here being as follows (p. 488):

> In this sense they are appropriated—not disposed of in the sense of sold or its equivalent, but set apart for disposition in a particular manner in pursuance of a defined policy. This appropriation does not place the lands beyond the power of other disposition by Congress, but so long as it stands unaltered, controls the Secretary of the Interior under whose direction the State selections in question must be made.

The Secretary then said (p. 489):

> The lands involved in this case were, at the time of the attempted selection thereof by the company, "appropriated" in the same sense as were those which the State of Utah applied to select in the above-mentioned case. They were set apart for exclusive disposition "under the homestead laws." Other departmental decisions are practically to the same effect as in the Utah case.

So here, the lands sought to be selected were in 1915, before the relinquishment of the company was made and more than five years before the selection was tendered, withdrawn or reserved for special disposition under the coal land laws. And still more important they, in common with all coal lands, were by the Leasing Act of February 25, 1920, made subject to disposition by leasing and in

that special way only. They were therefore at the date of the filing of the selection " otherwise appropriated " within the meaning of that expression in the Act of June 22, 1874.

Appellant derives a great deal of comfort from *Santa Fe Pac. R. R. Co.* v. *Fall,* 259 U. S. 197, but we fail to see how that case helps it. The point decided was that under the exchange act there considered the Secretary of the Interior must determine the right of the selector to the land as of the time of the application for the selection and could not give consideration to afteroccurring events. It was said (p. 200):

> It is established in the parallel cases of *Payne* v. *Central Pacific Ry. Co.,* 255 U. S. 228; *Payne* v. *New Mexico,* 255 U. S. 367, and *Wyoming* v. *United States,* 255 U. S. 489, 496, that the validity of the selection must be determined according to the conditions existing at the time when it was made.

Now the selection here involved was made December 1, 1921. The withdrawals of the land had all been made prior to that date, and the Leasing Act of February 25, 1920, was then operative. The Secretary in deciding the case took into consideration only the status of the land as of the date when applied for. It was not only competent for him to do that, but it was his plain duty so to do.

We think appellant's main difficulty in this case is in confusing the granting act and the Act of June 22, 1874. What the company's rights or privileges were under the granting act is entirely distinct from its rights under the Act of 1874. As we

have already pointed out, the latter Act was not in any way in fulfillment of or supplemental to the granting act; was in no way dependent upon it; and provided for conditions obtaining after the right of the railroad company had vested.

Appellant lays stress upon the provision in the Act of June 22, 1874, which declares that the company is to receive title to the selected land "the same as though originally granted." But the question here is not what kind of title the company is to receive but what kind of land it may receive title to, or, more strictly, whether it shall receive title to land coal in character which has previous to selection been "otherwise disposed of."

The Court of Appeals said on this point (R. 19):

> This refers merely to the kind of title and the avenue through which it shall pass, and does not relate to the quality of land to be selected, or invest the railroad company with any right of selection equivalent to that provided in the original grant. They are words of conveyance, not of power.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals was right and should be affirmed.

JAMES M. BECK,
Solicitor General.
IRA K. WELLS,
Assistant Attorney General.
H. L. UNDERWOOD,
Special Assistant to the Attorney General.
MARCH, 1925.

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